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No. 82-1480

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

CHARLES ZOSLAW and JANE ZOSLAW,
husband and wife,
dba MARIN MUSIC CENTRE,
Petitioners,

vs.

MCA DISTRIBUTING CORPORATION, DOUG ROBERTSON ADVERTISING, INC., MTS, INC., TOWER ENTERPRISES, INC., WARNER/ELEKTRA/ATLANTIC CORPORATION, ABC RECORDS, INC., POLYGRAM DISTRIBUTION, INC., CAPITOL RECORDS, INC. and CAPITOL INDUSTRIES-EMI,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF RESPONDENTS MTS, INC. AND TOWER ENTERPRISES, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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OPINION BELOW

The opinion of the court of appeals has been officially reported at 693 F.2d 870, in addition to the unofficial report cited in the petition.

COUNTERSTATEMENT OF THE CASE

This antitrust action was brought by petitioners, the owners of a retail outlet for phonograph records and tapes. Petitioners claimed in their original complaint that the defendants—record and tape distributors, three retailers, and an advertising agency—violated sections 2(a), 2(d), and 2(e) of the Robinson-Patman Act, 15 U.S.C. §§ 13(a), 13(d), and 13(e), by discriminating in favor of retail chain stores in granting favorable price and promotional terms and furnishing special services.[1] By amendment to the original complaint, petitioners added a claim that the distributor defendants conspired horizontally among themselves and vertically with the retailer defendants to favor retail chain stores, allegedly in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. Finally, petitioners claim that MTS attempted to monopolize the retail record and tape market in violation of Section 2 of the Sherman Act, 15 U.S.C. §2.[2]

Respondent MTS, Inc. ("MTS") is a retailer of records and tapes.[3] MTS operates two stores in the six San Francisco-Bay Area counties. Plaintiffs did not controvert the evidence below that MTS accounted for less than ten

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[1]No party has petitioned this Court to review the decisions below as to petitioners' Robinson-Patman Act claims.

[2]Petitioners' additional claim that MTS monopolized trade was abandoned on appeal and is not raised by the petition for certiorari. 693 F.2d at 889 n.23; App. at A68.

[3]Respondent Tower Enterprises, Inc., also named as a defendant, was a subsidiary that has been merged into MTS during the pendency of this action.

percent of the total retail record and tape sales in the six San Francisco-Bay Area counties. 693 F.2d at 888 & n.22; App. at A53, A54 & A68.

At the close of four years of discovery, the district court granted respondents' motions for summary judgment. The district court relied on two independent grounds for granting summary judgment in favor of respondents on the Sherman Act claims. First, in the face of an adequate initial showing by respondents in support of the motions for summary judgment, petitioners failed to comply with the requirements of Rule 56(e)[4] of the Federal Rules of Civil Procedure and Rule 220-8[5] of the Local

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[4]Rule 56(e) provides:

> (e) *Form of Affidavits; Further Testimony; Defense Required.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

[5]Local Rule 220-8 (renumbered 220-7 as of March 1, 1981) of the United States District Court for the Northern District of California provides, in pertinent part:

> *Affidavits and Declarations*
>
> Factual contentions made in support of or in opposition to any motion shall be supported by affidavits or declarations.

Rules of the United States District Court for the Northern District of California, which impose requirements of competency and authentication as to affidavits and other documents submitted in opposition to a motion for summary judgment. 533 F. Supp. at 546-48; App. at B11-B20. Second, the district court held that, aside from the procedural and evidentiary defects in petitioners' opposition to the motions for summary judgment, petitioners failed to present a viable legal theory that could sustain a judgment in their favor based on the factual showing made. 533 F. Supp. at 551-55; App. at B28-B41.

On appeal, the Ninth Circuit unanimously affirmed each of the district court's holdings as to the petitioners' Sherman Act claims. The court of appeals expressly affirmed the district court's reliance on Rule 56(e) of the Federal Rules of Civil Procedure and Rule 220-8 of the Local Rules of the United States District Court for the Northern District of California. 693 F.2d at 882-83; App. at A30-A34. As in alternative ground of decision, on the merits of the legal issues presented by petitioners' Sherman Act claims, the court of appeals like the district court found no legal basis for the claim of horizontal conspiracy in restraint

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Affidavits and declarations shall contain only facts, shall conform as far as possible to the requirements of Rule 56(e), Federal Rules of Civil Procedure, and shall avoid conclusions and argument. Any statement made upon information or belief shall specify the basis therefor. Affidavits and declarations not in compliance with this Rule shall be subject to being stricken in whole or in part. . . . Extracts from depositions, interrogatory answers, requests for admission and other evidentiary matter will be considered only if presented appropriately authenticated by affidavit or declaration.

of trade among the respondent record and tape distributors. 693 F.2d at 884-86; App. at A35-A43. The court of appeals rejected as a matter of law petitioners' claim of illegal vertical conspiracies between distributors and favored retailers. 693 F.2d at 886-87; App. at A44-A47. The court of appeals also affirmed the district court's holding that the evidence presented by petitioners could not supply the requisite elements of the claim that MTS attempted to monopolize trade in a relevant market. 693 F.2d at 887-89; App. at A48-A54.

REASONS FOR DENYING THE WRIT

I

BECAUSE PETITIONERS HAVE NOT CHALLENGED THE INDEPENDENT PROCEDURAL GROUND FOR THE DECISIONS BELOW, THIS CASE PRESENTS NO QUESTIONS WORTHY OF CERTIORARI JURISDICTION

The petition's statement of questions presented fails to address the first of the two independent grounds for the decisions below: petitioner's flagrant violation of the procedural requirements for opposing summary judgment, pursuant to Rule 56(e) of the Federal Rules of Civil Procedure and Local Rule 220-8 of the Local Rules of the United States District Court for the Northern District of California.

The rules establish procedural requirements as to competency and authentication of the evidentiary support for factual contentions submitted in opposition to summary

judgment. The requirements are entirely distinct from any question posed in the petition.[6]

This independent basis for the decisions below, not challenged by a question "set forth in the petition or fairly included therein", Rule 21(a), Rules of the Supreme Court, will not be considered by the Court, absent "plain error". Rule 34.1(a), Rules of the Supreme Court. Far from "plain error," there are no "special and important reasons" for the exercise of certiorari jurisdiction to review a case that would require this Court to consider the contents and authentication of evidentiary documents submitted by petitioners in the district court. Rule 17.1, Rules of the Supreme Court.

Petitioners could not, and do not even attempt to support their arguments in this Court without reliance on many of the "literally hundreds of pages of documents" held by the courts below to have violated the requirements of Rule 56(e) and Local Rule 220-8. 693 F.2d at 883; App. at A33. Thus, there is no way for this Court to consider separately the substantive questions of antitrust law posed by petitioners.

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[6]Question 4 of petitioners' statement of questions presented purports to address the constitutionality of the decision below that no jury trial is required. Petition at 3. The constitutionality of summary judgment procedures has long been established. *See, e.g., Fidelity and Deposit Co. of Maryland v. United States*, 187 U.S. 315, 320 (1902); *see also* 6 J. Moore, Moore's Federal Practice ¶ 56.06[2] (2d ed. 1982).

II

THE HOLDINGS BELOW UNDER SECTION 1 OF THE SHERMAN ACT ARE CONSISTENT WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS

Petitioners argue that their opposition to respondents' motions for summary judgment raised genuine issues for trial regarding the existence of horizontal and vertical conspiracies in restraint of trade, in violation of Section 1 of the Sherman Act. Notwithstanding petitioners' scattershot citation of cases decided by this Court, the courts below correctly rejected petitioners' attempt to support this claim of conspiracy with evidence of purported uniformity in the distributor's treatment of chain retailers. As noted only two years ago, " 'this Court has never held that proof of parallel business behavior [by itself] conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense' ", *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 637 n.9 (1981), *quoting Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537, 541 (1954). The courts of appeals of seven circuits have developed the rule, applied in this case, that evidence of parallel conduct, standing alone, does not raise a triable issue as to conspiracy.[7] Moreover, parallel conduct among *distributors* could not, by itself, sustain a rational inference that a retailer such as MTS was a conspirator.

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[7]*See, e.g., Proctor v. State Farm Mutual Automobile Insurance Co.*, 675 F.2d 308, 327 (D.C. Cir.), *cert. denied*, 103 S.Ct. 86 (1982); *Weit v. Continental Illinois National Bank & Trust Co. of Chicago*, 641 F.2d 457, 462 (7th Cir. 1981), *cert. denied*, 455 U.S. 988 (1982); *Schoenkopf v. Brown & Williamson Tobacco Corp.*, 637 F.2d 205, 208 (3d Cir. 1980); *Pan-Islamic Trade Corp. v.*

Petitioners focus on evidence that distributors' credit managers met.[8] The court of appeals reviewed this evidence and found only the exchange of information regarding retailers' credit histories, permitted under *Cement Manufacturers Protective Association v. United States*, 268 U.S. 588, 600 (1925). 693 F.2d at 885-86; App. at A41-A42. Petitioners miss the point in their attempt to invoke *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980) (*per curiam*), *Catalano* addressed the question whether a horizontal agreement to fix credit terms would be illegal *per se*, not the question whether such an agreement among competitiors could be *inferred* from their exchange of credit information. Expressly distinguishing the latter question, this Court in *Catalano* relied upon *Cement Manufacturers Protective Association v. United States. Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. at 648 n.12.

Thus, applying well-settled precedent from this Court and the court of appeals, the Ninth Circuit correctly disposed of petitioners' horizontal conspiracy claims.

Petitioners also argue that this case involves a triable issue as to vertical conspiracies between each record and tape distributor and each chain retailer. However, the only evidence of vertical arrangements petitioners presented was that distributors sold records and tapes to retailers such as MTS at prices and on other terms of sale that

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Exxon Corp., 632 F.2d 539, 559 (5th Cir. 1980), *cert. denied*, 454 U.S. 927 (1981); *Syufy Enterprises v. National General Theatres, Inc.*, 575 F.2d 233, 236 (9th Cir.) *cert. denied*, 439 U.S. 954 (1978); *Admiral Theatre Corp. v. Douglas Theatre Co.*, 585 F.2d 877, 885 (8th Cir. 1978); and *Modern Home Institute, Inc. v. Hartford Accident & Indemnity Co.*, 513 F.2d 102, 111 (2d Cir. 1975).

[8]Petitioners made no showing that MTS took part in any meetings among distributors' credit managers.

were favorable when compared to the terms of the separate contracts of sale to petitioners' store. 693 F.2d at 886; App. at A45. Petitioners presented no evidence of any agreement between a distributor and MTS that restricted the terms of the distributors' sales to petitioners or any other third parties. *Id.*

The court of appeals held that no *per se* violation of section 1 of the Sherman Act and no unreasonable restraint of trade could be found based solely on sales contracts that did not "in any way restrict either party's dealings with others." 693 F.2d at 886; App. at A45, *quoting National Tire Wholesale, Inc. v. Washington Post Co.*, 441 F.Supp. 81, 81 (D.D.C. 1977), *affirmed*, 595 F.2d 888 (D.C. Cir. 1979). Ample recent authority stands for the same principle. *See, e.g., Proctor v. State Farm Mutual Automobile Insurance Co.*, 675 F.2d 308, 337-38 (D.C. Cir.), *cert. denied*, 103 S.Ct. 86 (1982); *Quality Auto Body, Inc. v. Allstate Insurance Co.*, 660 F.2d 1195, 1203-05 (7th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982); *Sitkin Smelting and Refining Co. v. FMC Corp.*, 575 F.2d 440, 448 (3d Cir.), *cert. denied*, 439 U.S. 866 (1978); *Sausalito Pharmacy, Inc. v. Blue Shield of California*, 544 F.Supp. 230, 237 (N.D. Cal. 1981), *affirmed*, 677 F.2d 47 (9th Cir.) (*per curiam*), *cert. denied*, 103 S.Ct. 376 (1982).[9]

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[9]Petitioners' reliance on *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948), is misplaced. Unlike this case, *Paramount* involved evidence of an industry rife with horizontal and vertical price-fixing agreements, 334 U.S. at 142, as well as vertically integrated motion picture distributors and exhibitors and other vertical profit-sharing contracts, 334 U.S. at 149-50, that could sustain an inference that distributors employed disparate treatment of exhibitors to exclude unfavored exhibitors from the market. There is no basis in the instant case for such an inference, and no other

After carefully considering the evidence petitioners offered regarding the vertical arrangements between distributors and favored retailers, both courts below concluded that the facts upon which petitioners rely are not susceptible of the interpretation that respondents unreasonably restrained trade. Such a legal conclusion is proper on summary judgment. *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 289 (1968).

III

THE COURTS BELOW CORRECTLY APPLIED WELL-SETTLED PRINCIPLES IN REJECTING THE CLAIM OF ATTEMPTED MONOPOLIZATION

Petitioners seek review of the question whether MTS can be held liable under Section 2 of the Sherman Act for predatory pricing based on evidence of sales at prices above its own costs but below petitioners' costs. Petition at 2, Question 2. This question is squarely answered in the negative according to principles that are unanimously accepted by the courts of appeals and consistent with the decisions of this Court. Indeed, petitioners cite not a single case in which a court has found predatory pricing or an attempt to monopolize on comparable facts.

There is no conflict among the circuits on the dispositive legal principles. Pricing can be held predatory and condemned under Section 2 of the Sherman Act, absent evi-

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facts to support an inference that differences in terms of sale to different record and tape retailers constituted an unreasonable restraint of trade. Moreover, in *Paramount*, the contracts licensed theatres in a given area to give successive, exclusive exhibitions of motion pictures. 334 U.S. at 144-45. Such a contract inherently restricts the distributor's dealings with other exhibitors, unlike the contracts between distributors and retailers in this case.

dence of actual monopoly, only if the well-settled elements of attempted monopolization are satisfied: (1) specific intent to monopolize; (2) conduct designed to implement that intent; and (3) a dangerous probability of success. 693 F.2d at 887. App. at A48.[10]

Notwithstanding petitioners' repeated emphasis of an unauthenticated quotation from the president of MTS,[11] the courts below correctly concluded that there was no evidence of specific intent to monopolize. 693 F.2d at 887; App. at A49-A50. The court of appeals refused to allow an inference of such intent from conduct consisting of setting prices at levels concededly above MTS's costs, absent evidence of other factors tending to establish the elements of attempted monopolization. 693 F.2d at 888; App. at A51-A52. This conclusion resulted from a straightforward application of a standard this Court declined to review last term. *William Inglis & Sons Baking Co. v. ITT Continental Baking Co., Inc.*, 668 F.2d 1014, 1030, 1036 (9th Cir. 1981), *cert. denied*, 103 S.Ct. 58 (1982) (Docket No. 81-2083). The Ninth Circuit's conclusion accords with

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[10]*See, e.g., Sunshine Books, Ltd. v. Temple University*, 697 F.2d 90, 93 n.9 (3d Cir. 1982); *William Inglis & Sons v. ITT Continental Baking Co., Inc.*, 668 F.2d 1014, 1027 (9th Cir. 1981), *cert. denied*, 103 S.Ct. 58 (1982); *Superturf, Inc. v. Monsanto Co.*, 660 F.2d 1275, 1281 (8th Cir. 1981); *Northeastern Telephone Co. v .AT&T*, 651 F.2d 76, 85, 87-88 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982). *See also* cases cited in Handler & Stever, *Attempts to Monopolize and No-Fault Monopolization*, 129 U. Pa. L. Rev. 125, 145 n.63 (1980).

[11]Aside from petitioners' failure to authenticate any evidence of the quotation, a statement that MTS would "zing" its competitors simply suggests a pro-competitive desire to outsell other retailers. Such evidentiary details do not, in any event, merit this Court's attention.

the criteria for predatory pricing adopted by other circuits.[12]

The district court specifically addressed the third element of attempted monopolization as well, concluding that there was no basis for inferring, from MTS's pricing policies or from its ten percent market share, that there was a dangerous probability that it would succeed in monopolizing trade in a relevant market. 633 F. Supp. at 555; App. at B41.

In short, this case could have presented a question regarding predatory pricing worthy of certiorari jurisdiction only if the courts below had reached the opposite conclusion.

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[12]*See e.g., MCI Communications Corp. v. AT&T*, 5 Trade Reg. Rep. (CCH) ¶ 65,137 (7th Cir. Jan. 12, 1983); *Richter Concrete Corp. v. Hilltop Concrete Corp.*, 691 F.2d 818, 822-24 (6th Cir. 1982); *Chillicothe Sand & Gravel Co. v. Martin Marietta Corp.*, 615 F.2d 427 (7th Cir. 1980); *Northeastern Telephone Co. v. AT&T*, 651 F.2d at 88-90; *Pacific Engineering & Production Co. v. Kerr-McGee Corp.*, 551 F.2d 790, 797 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977).

CONCLUSION

For each of the reasons stated herein, respondents MTS, Inc. and Tower Enterprises, Inc., submit that the petition for certiorari should be denied.

Respectfully submitted,

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STATEMENT PURSUANT TO RULE 28.1

MTS, Inc. has no parent corporation, affiliates, or partially-owned subsidiaries. Tower Enterprises, Inc., a former wholly-owned subsidiary, was merged into MTS, Inc. during the pendency of this action.